No. 84-1485

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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1984

JOHN MORAN,

Petitioner,

v.

BRIAN K. BURBINE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
First Circuit

BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VIRGINIA, VERMONT, WEST VIRGINIA, WISCONSIN and WYOMING; THE GOVERNMENTS OF GUAM and the VIRGIN ISLANDS OF THE UNITED STATES; and THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

This case presents significant questions relating to the obligations of police when an attorney inquires about a custodial suspect, and the admissibility

of any statements made by the suspect if the police fail to inform him of the attorney's inquiry. Though an issue of first impression for this Court, a number of state courts have reached it. There is split of authority among them on the necessity for the rule promulgated by the First Circuit. The amici Attorneys General of their respective states have a direct interest in the resolution of the issue by this Court. The brief is filed on their behalf pursuant to Rule 36.4, Supreme Court Rules of Court.

The amicus NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., is a non-profit corporation and the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications and amicus curiae activity carry out its guiding purpose since its founding in 1950 of reforming the criminal

justice system for the benefit of all our citizens. The brief is filed on its behalf pursuant to Rule 36.2. Consent to file has been granted by Constance L. Messore, Special Assistant Attorney General, State of Rhode Island, Counsel for Petitioner, and Robert Mann, Esq., Counsel for Respondent. Letters of Consent of both paties will be filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Miranda v. Arizona (1966) 384 U.S. 436, set forth precise guidelines for police officers to insure that a suspect knows of and understands his Fifth Amendment privilege against self-incrimination before he is interrogated. These rules protect the suspect from the state; they do not protect the suspect from himself. The First Circuit has substantially expanded upon the Miranda requirements by ordering police to

inform a suspect of an attorney's interest in him. Failure to do so requires suppression of any statements made by the suspect, despite full compliance with the Miranda rules and a waiver of his rights by the suspect. Amici submit that this rule will obscure Miranda's clear guidelines. Neither the language of the Fifth Amendment's Self-Incrimination Clause, nor any decisions of this Court interpreting that provision, supports the First Circuit's decision.

ARGUMENT

I

A CRIMINAL SUSPECT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED WHEN HE IS NOT INFORMED THAT AN ATTORNEY HAS ASKED TO SPEAK WITH HIM

The United States Court of Appeals for the First Circuit held that Brian Burbine's three confessions must be suppressed although each was preceded by

complete and accurate Miranda warnings and an express waiver of his rights. This conclusion resulted from the fact that Burbine was not informed that an assistant public defender had contacted the police and stated that she would represent him during any lineup or questioning. The court established, as a constitutional requirement, that "[d]eliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect, . . . vitiates any claim that a waiver of counsel was knowing and voluntary." Burbine v. Moran (1st Cir. 1985) 753 F.2d 178, 187.

Though the First Circuit's holding accords with decisions from some other jurisdictions, it is not as uniformally endorsed as either the Court of Appeals [See 753 F.2d at 186] or Respondent [See Opposition to Petition for Writ of Certiorari at 4-5, 15), assert. Instead, several state courts have specifically rejected the expansion upon Fifth Amendment rights at issue in this case. See, e.g., People v. Saidi-Tabatabai (1970) 7 Cal.App.3d 981, 86 Cal.Rptr. 866;[1/] State v. Blanford (Iowa 1981) 306 N.W.2d 93; State v. Beck (Mo. 1985) 687 S.W.2d 155; State v. Chase (1978) 55 Ohio

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1. The issue is currently pending before the California Supreme Court in People v. Houston, Crim. 23713. The case was argued in September 1984 but has not yet been decided. In addition to the present case, the issue was raised in two Petitions for Writs of Certiorari filed recently by the State of Maryland. Maryland v. Lodowski, No. 85-23 and Maryland v. Elfadl, No. 85-24.

St.2d 237, 378 N.E.2d 1064; State v. Burbine (RI 1982) 451 A.2d 22. Amici submit that the rule adopted by the First Circuit is not required by the Fifth Amendment and is unfaithful to this Court's interpretation of the privilege against self-incrimination.

In Miranda v. Arizona (1966) 384 U.S. 436 this Court established that a suspect must be "clearly informed" of certain rights before he is questioned by the police. Those include, inter alia, "the right to consult with a lawyer and to have the lawyer with him during interrogation. . . ." 384 U.S. at 471. The Miranda warnings are not "themselves rights protected by the Constitution," but instead are "procedural safeguards" designed to "provide practical reinforcement for the right against compulsory self-incrimination." Michigan v. Tucker

(1974) 417 U.S. 433, 444. Thus, the purpose of Miranda is not to vindicate the Sixth Amendment right to counsel, but to effectuate the Fifth Amendment protection. United States v. Gouveia (1984) ___ U.S. ___, 104 S.Ct. 2292, 2298, n. 5; Kirby v. Illinois (1972) 406 U.S. 682, 689.

Prior to Miranda the courts used the Due Process Clause of the Fourteenth Amendment "to determine whether the processes [of interrogation] were so unfair or unreasonable as to render a subsequent confession involuntary." Michigan v. Tucker, supra, 417 U.S. at 441. The requirements of Miranda were intended in part to free courts "as much as possible" from individually reviewing the facts of each case to decide whether particular confessions were voluntary. Berkemer v. McCarty (1984) ___ U.S. ___, 104 S.Ct. 3138, 3147. The great practical benefits of Miranda's "rigid requirement" are that

it informs police and prosecutors precisely what they may do while conducting an interrogation, and assists courts in determining whether statements obtained during questioning are admissible. Fare v. Michael C. (1979) 442 U.S. 707, 718. The benefits of certainty to the accused and the state outweigh any burdens Miranda may impose by requiring the suppression of "trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." Id.

Miranda thus established a "bright line rule." Oregon v. Elstad (1985) ___ U.S. ___, 105 S.Ct. 1285, 1298. "At least in part in order to preserve its clarity," this Court has consistently "refused to sanction attempts to expand [the] Miranda holding." New York v. Quarles (1984) ___ U.S. ___, 104 S.Ct.

2626, 2633. "The meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its strictures. . . ." Rhode Island v. Innis (1980) 446 U.S. 291, 304 (Chief Justice Burger, concurring in the judgment).

The Miranda decision was designed to maintain a "fair balance" between the suspect and the state. Miranda v. Arizona, supra, 384 U.S. at 460. See also Berkemer v. McCarty, supra, 104 S.Ct. at 3147; New York v. Quarles, supra, 104 S.Ct. at 2632. The rules were not intended, however, to foreclose police from conducting an interrogation, or to prevent suspects from confessing.

"[A]dmissions of guilt by wrongdoers, if not coerced, are inherently desirable." United States v. Washington (1977) 431 U.S. 181, 187. See also Miranda v. Arizona, supra, 384 U.S. at 478. As a result, a suspect who has been warned of

his rights "is free to exercise his own volition" in deciding whether or not to talk with the police. Oregon v. Elstad, supra, 105 S.Ct. at 1293. In short, Miranda protects the suspect from the state; it does not protect the suspect from himself. It is the latter protection, however, which the First Circuit seems to extend. The Court of Appeals's decision effectively shifts the doctrinal basis for the Miranda warnings from protection of the Fifth Amendment privilege, to a Sixth Amendment right of counsel whenever the suspect is questioned.[2/]

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2. Since the issue upon which this Court granted certiorari deals solely with the Fifth Amendment, we will not discuss the Sixth Amendment implications except to note that the right to counsel under that provision does not attach until the initiation of adversay judicial proceedings. See, e.g., United States v. Gouveia (1984) ___ U.S. ___,

(Footnote continued on next page.)

The rule adopted by the First Circuit requires notification to the suspect of any contact from an attorney "who has a legitimate, professionally ethical interest" in the suspect and who expresses a "desire" to be present during interrogation. 753 F.2d at 187. According to that Court, restricting the rule to an attorney who has a "continuing relationship" with the suspect will preclude other attorneys without such a relationship from volunteering their services whenever someone is arrested. Id. The assumption that all attorneys operate at the highest

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Footnote 2 continued:

104 S.Ct. 2292, 2297-2298. Though the First Circuit insisted that it was only considering a Fifth Amendment claim [Burbine v. Moran, supra, 753 F.2d at 183 and 187, n. 5], its misapplication of this Court's interpretation of the privilege against self-incrimination suggests that the Court of Appeal might have considered a different constitutional right.

ethical plane when communicating with the police is somewhat naive. See e.g. People v. Saidi-Tabatabai, supra, 7 Cal.App.3d at 985, n. 2; 86 Cal.Rptr. at 869, n. 2. Moreover, it raises a variety of additional problems.

The most serious impact of the First Circuit rule is the loss of clear cut rules for reviewing the admissibility of statements. Instead of determining whether the Miranda admonishments were properly given, and if so, whether there was a voluntary waiver of rights, it is not inconceivable that "an elaborate set of rules, interlaced with exceptions and subtle distinctions" [Berkemer v. McCarthy, supra, 104 S.Ct. at 3147] will evolve. Courts will be forced to decide whether an attorney contacted the police, whether he had the appropriate "ethical interest" in the supect, whether he sought involvement in the

interrogation rather than just information, whether the police misled the attorney, and whether the suspect was adequately advised of the attorney's contact. Just as there was no "compelling justification" in Berkemer to interfere with the simplicity of Miranda by basing the need for warnings on the nature or seriousness of the underlying offense [Id.], Amici submit that the First Circuit failed to justify the rule it has adopted, and the difficulty it will cause the police and courts.

The police are as "ill equipped" to determine when an attorney's relationship with a suspect is legitimate and ethical as they are to advise suspects of whether their statement will ultimately be held admissible. Oregon v. Elstad, supra, 105 S.Ct. at 1297. In People v. Arthur (1968) 22 N.Y.2d 325, 292 N.Y.S.2d 663, for example, the attorney was a friend of the

suspect who heard about his arrest on television. The attorney's gratuitous appearance at the police station to offer assistance was sufficient to trigger an additional admonishment to the suspect.[3/] It may be, as the Rhode Island Supreme Court feared in its opinion in this case, that dissemination of a list of clients by the public defender to police agencies would satisfy the First Circuit's rule. If so, police may be forced to specifically admonish all suspects of all contacts by attorneys, or persons purporting to be attorneys, in order to prevent possible suppression of statements later. Indeed, it may be enough for the public

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3. In People v. Houston, the case pending before the California Supreme Court, a mutual friend of the defendant and an attorney contacted the lawyer when he heard of the defendant's arrest, and asked that he check on the defendant.

defender to simply insist upon seeing all arrestees in order to require an additional admonishment to all suspects from the police. This was clearly not intended by Miranda, nor is it necessary to effectuate the privilege against self-incrimination.

Perhaps the greatest inconsistency with Miranda is the manner in which the First Circuit shifts attention from the relationship between the suspect and the police, to the contact between an attorney and the police. This approach is improper for several reasons.

First, the First Circuit is overly concerned with what the police are told by an attorney and with their statements to him. The Court essentially dismisses as irrelevant the more critical consideration of what the suspect was told by the police pursuant to Miranda and how he responded

to those warnings. The Miranda admonishments convey to the suspect the relevant information on his rights. His decision to waive those rights or to exercise his privilege should depend upon what he is told, rather than what an attorney is or is not told, or does or does not tell the police.

The Court of Appeals responds, in part, to such criticism by suggesting that failure to advise the suspect of a particular attorney's interest in the case, as opposed to the more generalized concept of an attorney required by Miranda, invalidates any waiver of rights because it was induced by police trickery and obtained in the absence of sufficient information to make a knowing and intelligent waiver. This Court has emphasized, however, that Miranda is satisfied so long as a suspect is advised of his right to an attorney and

that one will be appointed to represent him if he is indigent. Nothing more is required. California v. Prysock (1981) 453 U.S. 355, 359-360.

In Oregon v. Elstad, supra, this Court recently held that requiring police to inform a suspect that an earlier statement given without the benefit of Miranda warnings could not be used against him was "neither practicable nor constitutionally necessary." 105 S.Ct. at 1297. Since the suspect is explicitly informed of his right to consult with a lawyer before answering police questions, failure to admonish him of the potential consequences of his decision does not undercut the voluntariness of a waiver. Id. Similarly, failure to advise that a particular attorney has asked about or is willing to speak with the suspect does not lessen the voluntariness of the suspect's waiver of

his rights, assuming full compliance with Miranda.

A violation of the Self-Incrimination Clause must include an element of coercion, because that provision of the Fifth Amendment "provides only that a person shall not be compelled to give evidence against himself." Michigan v. Tucker, supra, 417 U.S. at 448. (Emphasis in original.) Where there is neither coercion or its equivalent nor an improper police tactic, the rationales of trustworthiness and deterrence militate against expansion of the Miranda requirements. Oregon v. Elstad, supra, 105 S.Ct. at 1293. While evidence of police threats or trickery will effect the voluntariness of a waiver [Miranda v. Arizona, supra, 384 U.S. at 476], the simple failure to advise a suspect of an attorney's inquiry about him or request to speak with him cannot

be characterized as coercive. Respondent in this case was in the same position and had the same rights as every other custodial suspect whom the police wished to question. He was carefully and explicitly advised of his rights, which he acknowledged understanding and then waived. The police could do no less for him, but they were not constitutionally required to do more.

A second flaw in the First Circuit's rule is that it effectively permits an attorney to assert a suspect's Fifth Amendment privilege against self-incrimination. Cf. Commonwealth v. McKenna (1969) 355 Mass. 313, 244 N.E.2d 560, 566-567. This ignores the fact that that the self-incrimination privilege is "intimate and personal." Couch v. United States (1973) 409 U.S. 322, 328. Accord, United States v. Nobles (1975) 422 U.S. 225, 233. The "principles of Miranda

place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happened to be attorneys." People v. Burbine, supra, 451 A.2d at 28. Yet, that is precisely what the First Circuit does by allowing contact between the police and an attorney to preclude use of any statement by the suspect, assuming that the attorney says the right thing to the police.

This leads to a third defect in the First Circuit's reasoning: it predicates protection of the suspect's Fifth Amendment privilege on "the fortuitous circumstance" that someone sees "fit to call the [police] station." People v. Burbine, supra, 451 A.2d at 30. If, as the First Circuit assumes, a waiver of rights is more knowing and voluntary for Fifth Amendment purposes when the

suspect is informed that a specific attorney wants to see him than when he is not, then the waiver by a suspect for whom no attorney is waiting in the wings must also be questioned. Carried to its logical conclusion the First Circuit's reasoning could require that counsel be ready and waiting at the police station, and that the suspect be so informed before questioning. Yet the Miranda decision explicitly rejected such a requirement. 384 U.S. at 474.

More significantly, what of the case in which an attorney simply calls the police to ask about a suspect, but does not indicate a desire to participate in any questioning or to immediately see the suspect? The First Circuit distinguishes these cases, holding that only when the attorney says the right thing is a duty to inform imposed upon the police. Compare Burbine v. Moran, supra, 753 F.2d at 187,

with Fuentes v. Moran (1st Cir. 1984) 735 F.2d 176, 181 (the officers had no duty "to volunteer to Fuentes that [an attorney] had made a half-hearted inquiry as to Fuentes's status"). Rather than reviewing the completeness and accuracy of the warnings given to the suspect by the police, the courts must now focus on precisely what the attorney said to the police. As discussed above, this results in a significant reduction in the clarity of the Miranda holding.

The First Circuit also forces consideration of when the attorney calls in relation to when the interrogation begins. If one officer is told that a lawyer wants to see the suspect, how quickly must he inform the interrogating officer in order to insure the voluntariness of a waiver? Indeed, if the First Circuit's requirement is necessary

to insure a knowing and intelligent waiver of rights, the police may be obligated to interrupt an interrogation in progress so that the suspect can knowingly decide whether to continue answering questions.

In recent Terms this Court has explored in some detail the implications and importance of Miranda. See, e.g. Oregon v. Elstad, supra; Berkemer v. McCarty, supra; New York v. Quarles, supra; Minnesota v. Murphy (1984) ___ U.S. ___, 104 S.Ct. 1136. Aside from the "narrow exception" for "situations presenting a danger to the public safety" created in New York v. Quarles, 104 S.Ct. at 2633, this Court has turned aside every effort to expand upon Miranda. The opinion of the First Circuit ignores this line of cases, imposing instead an unnecessary and burdensome restriction on the proper use of police interrogation. Amici do not seek a retreat from Miranda

and its progeny. We ask instead that this Court maintain, as it has in the past, "the simplicity and clarity of the holding of Miranda." Berkemer v. McCarty, supra 104 S.Ct. at 3147. We ask that the First Circuit's transformation of Miranda from a Fifth Amendment decision protecting custodial suspects from police coercion, into a Sixth Amendment decision protecting foolish suspects from themselves, be rejected.

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CONCLUSION

For the foregoing reasons, amici respectfully submit that the judgment of the United States Court of Appeals for the First Circuit should be reversed.

DATED: July 10, 1985

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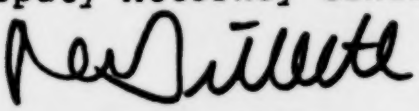

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